TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1912.

No. [redacted]. 19.

GERMAN ALLIANCE INSURANCE COMPANY,
PETITIONER,

vs.

HOME WATER SUPPLY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 19, 1910.
CERTIORARI AND RETURN FILED APRIL 18, 1910.

(22,069)

(22,069)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 232.

GERMAN ALLIANCE INSURANCE COMPANY, PETITIONER,

vs.

HOME WATER SUPPLY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX.

	Original	Print
Caption	*a*	1
Transcript from the circuit court of the United States for the district of South Carolina	1	1
Caption	1	1
Summons	1	2
Complaint	2	2
Return of service	9	8
Notice of appearance	9	8
Demurrer	10	8
Order sustaining demurrer and dismissing complaint	11	9
Petition for writ of error and allowance of writ	11	9
Assignment of errors	12	10
Appeal bond and approval	16	14
Writ of error	19	16
Citation	20	17
Order to transmit record	20	17
Clerk's certificate	21	17
Pocket entries	23	18

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 28, 1911.

Original.	Print
24	18
24	19
25	19
37	27
38	28
38	28
39	28
41	29
42	29
43	29

a *Transcript of Record.*

United States Circuit Court of Appeals, Fourth Circuit.

No. 882.

GERMAN ALLIANCE INSURANCE COMPANY, Plaintiff in Error,
versus
HOME WATER SUPPLY COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for *for* the District of South Carolina, at Greenville.

Record filed January 11, 1909.

[Stamped:] Cerk's Office, U. S. Circuit Court of Appeals, Fourth Circuit. Henry T. Meloney, Clerk, Richmond.

1 *Transcript of Record.*

Caption.

THE UNITED STATES OF AMERICA,
District of South Carolina, To wit:

In the Circuit Court, Fourth District.

At a Circuit Court of the United States for the District of South Carolina, begun and held at the Court House, in the City of Greenville, on the third Tuesday of April, 1908, being the 21st day of the same month, in the year of our Lord one thousand nine hundred and eight.

Present: The Honorable William H. Brawley, United States Judge for the District of South Carolina:

Among other were the following proceedings, to-wit:

At Law.

GERMAN ALLIANCE INSURANCE COMPANY, Citizen of the State of New York, Plaintiff,
vs.
HOME WATER SUPPLY COMPANY, Citizen of the State of South Carolina, Defendant.

Summons.

Filed May 7, 1907.

United States of America, District of South Carolina, in the Circuit Court.

GERMAN ALLIANCE INSURANCE COMPANY, Citizen of the State of New York, Plaintiff,
against
HOME WATER SUPPLY COMPANY, Citizen of the State of South Carolina, Defendant.

To Home Water Supply Company, defendant in this action:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you,
2 and to serve a copy of your answer on the subscriber at his office, in the City of Spartanburg, S. C., on or before the rule day occurring twenty days after the service of this summons on you, exclusive of the day of service.

If you fail to answer this complaint within the time aforesaid, the plaintiff will apply to the court for judgment against you for the sum of thirty-eight thousand eight hundred and ten dollars, with interest from April 6, 1907.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at Charleston, South Carolina, the 7 day of May, Anno Domini, one thousand nine hundred and seven and in the 131st year of the Sovereignty and independence of the United States of America.

STANYARNE WILSON,
Plaintiff's Attorney.

C. J. MURPHY,
[SEAL.] *C. C. C. U. S., Dist. S. C.*

Complaint.

Filed May 7, 1907.

United States of America, District of South Carolina, in the Circuit Court.

GERMAN ALLIANCE INSURANCE COMPANY, Citizen of the State of New York, Plaintiff,
vs.
HOME WATER SUPPLY COMPANY, Citizen of the State of South Carolina, Defendant.

Plaintiff above-named, complaining of the defendant herein, respectfully shows to the court:

1. That at the times hereinafter mentioned, plaintiff was and still is a fire insurance company chartered and organized by law of the State of New York, and resident and citizen of said State.

2. That at the same time defendant, Home Water Supply Company, was and still is chartered and organized under the laws of the State of South Carolina and doing business in the City of Spartanburg, as hereinafter more particularly stated, and a resident and citizen of South Carolina.

3 3. That at the same time Spartan Mills was and still is a corporation chartered and organized under the laws of said State of South Carolina, doing business in and owning the property hereinafter more particularly described, located in said City of Spartanburg.

4. That on August 29, 1906, plaintiff, for valuable consideration, made a contract of insurance with Spartan Mills, evidenced by plaintiff's policy, #80106, whereby it insured against loss by fire—for a period of five years from said date—certain of said Spartan Mills houses located in said city, by form of policy known as "Standard," to-wit: Forty-four five room houses, seven ten-room houses, two fourteen room houses, and one sixteen-room house; the same being of the estimated value of forty-six thousand four hundred and nine dollars, and carrying insurance under said policy in the total amount of thirty-nine thousand four hundred dollars. That said property was under the protection of said policy when destroyed by fire on March 25, 1907, and so known to defendant. That the destruction of all the houses was total, except one six-room house which was only damaged to the extent of ten dollars; making the entire loss to plaintiff thirty-eight thousand eight hundred and ten dollars.

5. That on April 6, 1907, plaintiff paid said Spartan Mill the full amount of said loss under said policy, receiving credit for one per cent. discount for paying in advance of maturity, and thereupon received from said insured the following subrogation receipt, to-wit:

Subrogation Receipt.

Received of the German Alliance Insurance Company of New York, the sum of thirty-eight thousand, four hundred and twenty-one and 90-100 dollars, being in full of all claims and demands for loss and damage by fire on the twenty-fifth day of March, 1907, to the property insured by policy No. 80106 and Renewal No. — issued at the Spartanburg, S. C., office of said company, and in consideration of such payment the undersigned hereby assigns and transfers to the said company each and all claims and demands against any person, persons, corporations or property arising from or connected with such loss or damage and the said company is subrogated in the place of and to the claims and demands of the undersigned against said person, persons, corporations or property in the premises to the extent of the amount named.

4 In witness whereof we have hereunto set our hand and seal this the sixth day of April one thousand nine hundred and seven.

SPARTAN MILLS, [L. S.]
By W. S. MONTGOMERY. [L. S.]

In presence of—
(Signed) A. W. GRIFFITH.

6. That said Spartan Mills was then and still is a corporation located in said city, doing business therein, with all of its property within the city limits, and a tax-payer of said city, contributing to the support of its government, entitled to the protection thereof and of all contracts made by the city for the protection from fire of property within its limits.

7. That on or about February 14, 1900, by ordinance of the City Council of said city duly made, ratified and promulgated, a contract was made and entered into by said city, through its City Council, and defendant Home Water Supply Company, through its representatives, and thereafter ratified by said company, whereby, for valuable consideration, said defendant company undertook to furnish adequate water protection to the property of the residents of said city, including said Spartan Mills, for a period of thirty-three years from said date. That the following are sections of such contract applicable to this action,—a copy of the contract in its entirety being now in possession of said defendant company, and which, for that reason is not fully incorporated herein, to-wit:

"SECTION 1. The said John B. Cleveland and his associates or assigns for the said Home Water Supply Company are hereby authorized and empowered to maintain, operate and own water works in the city of Spartanburg to supply the city and its inhabitants with pure and wholesome water, suitable for fire, sanitary and domestic purposes; to lay down pipes and water mains for the purpose of making extensions along the streets, avenues and alleys of said city; to acquire and hold any and all real estate, easement and water rights necessary to that end and purpose, to use within the present and future limits of said city all streets, alleys, avenues, bridges, bed of streams and such public grounds as now or may hereafter be laid out; to receive, take, store, purify, conduct, and distribute water through said city, to erect and maintain settling basins, filtering galleries, reservoirs, water tower and all other necessary buildings, and machinery and other appliances, or attachments, necessary or expedient for the purpose of conducting and carrying on of said water works; to cross any street in said city for the purpose of laying pipes, conduits or aqueducts which may be necessary for the proper distribution of water throughout said city, so as to effect the most adequate supply for domestic use and greatest protection against fire. The said grantees to have the right to maintain, establish, conduct and operate said water works, as here specified for the term of thirty-three years from the first day of January, 1900.

SECTION 2. The water to be obtained by and through said water works shall be obtained from Chinquepin Creek and Archer's Branch, otherwise known as Arthur's Branch, just as it is now taken by the water works plant. The good character, quality and quantity of the water shall at all times be maintained by the said grantees and great care shall always be taken to prevent the source of the supply from being polluted or contaminated. That the water works committee shall have the right to require the dams and reservoirs emptied and cleaned out whenever they think necessary for the purity and protection of the water supply. Nothing in this section shall be con-

strued to hold the said grantees responsible for the failure of said creek to supply sufficient water in case of long protracted drought, and said City of Spartanburg agrees to enforce by proper police regulations and provisions of an Act of the General Assembly of the State of South Carolina, to protect the said supply from being contaminated.

SECTION 3. That in the work of laying pipe and making extensions or alterations, the said grantees shall not unnecessarily obstruct any street, alley, avenue or public ground, and in laying pipes and conduits, they shall repair and make good any gas or sewer pipes previously laid, that shall be disturbed by them and restore the street, alley, avenues and public grounds to as good condition as near as practicable, as they were before said work was commenced, and in making alterations or extensions or repairs in any street, alleys, avenues or public grounds, and in removing pavements and side walks, and making necessary excavations for repairs, they shall suitably guard and protect the same so as to prevent any injury to persons and to public and private property by reason thereof, and the said grantees shall be liable for all damages by failure to guard and protect persons or property from injury, when occasioned by the negligence of said grantees, their agents or employees, and shall hold the city harmless therefrom.

SECTION 4. The specifications as to engines, boilers, stand-pipe, water pressure, character and size of water mains used, shall
6 in every way conform to the specifications contained in the contract originally made with Moffett, Hodgkins and Clark. That when mains are put in for City Fire protection they shall not be less than six inches, unless permission is granted by the City Council.

SECTION 5. The city agrees to use the hydrants of the grantees for the extinguishment of fires only and for sprinkling purposes, under such regulations as may hereafter be made, and to make good to the grantees any injuries which may happen to them when used by any officer or servant of said city or any member of its fire department, and hereby agrees to pay rent for the said fire protection the sum of forty dollars per annum for each and every hydrant for the term of ten years from the first day of January, 1900. Said rental to be paid in two equal annual instalments on the first day of January and first day of July.

The said grantees shall constantly, day and night, except in the case of an unavoidable accident, keep all the said hydrants supplied with water for fire protection, and shall keep them in good order and efficiency for such service and shall always maintain a height of at least seventy (70) feet of water in the stand-pipe or water tower, except in case of unavoidable accident, or when water shall be drawn off for the clearing the same, or for any cause which cannot be controlled by grantees, and in case any of the hydrants shall be out of order, and the Chief of the Fire Department shall notify any officer in charge of said water works of that fact, and such hydrant shall remain out of order and unfit for use for a longer time than twenty-four hours after such notice, then, the said grantees will pay to the

cost intermediate fire hydrants wherever the intervals on the original location are five hundred feet or less, free of charge for water during the term of this agreement. Said intermediate hydrant to be used for fire purposes only, and for the benefit of the City only.

SECTION 6. And the city may at any time require the said grantees to make extensions of the pipe system of the said water works, by giving sixty days' notice to said grantees, and may order hydrants placed on such extensions at not less than ten to the mile, and the city agrees to pay rental for fire protection upon such extensions at the rate of forty dollars per year, per hydrant, for such unexpired term of the contract or renewals thereof from the time of
7 making such extensions, on the first days of January and July in each and every year during the continuance of this contract, and a sufficient tax shall be collected annually upon all taxable property of said city to meet the payments under this contract and ordinance, when and as they mature, during the existence of this contract or renewals thereof, which tax shall be irrepealable from and after the passage of this ordinance. The thread of all said hydrants shall be made to fit any particular hose coupling now in use by the fire department of the City of Spartanburg, which shall in ten days after the passage of this ordinance, or contract be presented by the Mayor of said city to the grantees for such purpose.

8. That the following is section 4 of the contract with Moffett, Hodgkins and Clark, referred to in section 4 of the contract with defendant company, to-wit:

SECTION 4. The said water works shall be complete and perfect in all its details as far as practicable. The pump house and boiler house combined shall be of suitable design, built of stone or brick, with tin or iron roof. There shall also be an engineer's dwelling in close proximity to said pump and boiler house. The machinery of said water works shall consist of one compound, condensing duplex steam pump, and one high pressure duplex pump, with return flue tubular steam boilers and other attachments, necessary to give a capacity to pump one million gallons in twenty-four hours against a pressure equivalent to a head of 200 feet, and a metallic stand-pipe or water tower made of the best material and of a capacity of not less than 130,000 gallons, and high enough to afford a head of at least 100 feet above Main street at the Windsor Hotel, or high enough to give adequate domestic pressure in any part of the city, and so arranged that it can be shut off from the pipe system by our patent electrical appliance for opening or shutting the valve or gate, so that in case of necessity and more pressure is required than is afforded by the water tower, the engineer can immediately pump direct into the mains, and give any pressure required, by direct pumping. All of the machinery shall be increased from time to time as the growth of the city may require. All of the water mains and pipes used by the said grantees shall be of the best quality of cast iron, coated inside and out with Dr. Angus Smith's patent coal tar varnish, and shall be

Return of Service.

UNITED STATES OF AMERICA,
District of South Carolina, ss:

I hereby certify and return that I served the annexed summons and complaint on the therein named Home Water Supply Company, by handing to and leaving a true and correct copy thereof with Jesse Cleveland, secretary and treasurer, personally, at Spartanburg, in said district, on the 9 day of May, A. D., 1907.

J. DUNCAN ADAMS,
U. S. Marshal,
By J. H. McLANE, *Deputy.*

Notice of Appearance.

Filed May 21, 1907.

Ralph R. Carson, Attorney and Counselor at Law,
Suite 4, Cleveland Building, Spartanburg, S. C.

MAY 20, 1907.

Mr. C. J. Murphy, C. C. C. U. S., Charleston, S. C.

DEAR SIR: I appear for the defendant in the case of German Alliance Insurance Co. vs. Home Water Supply Co.

Please enter this appearance on record. If it is necessary that I file a more formal notice, kindly advise me.

Yours very truly,
C—c. RALPH K. CARSON.

10 *Demurrer.*

Filed June 3, 1907.

United States of America, District of South Carolina, in the Circuit Court.

GERMAN ALLIANCE INSURANCE COMPANY, Citizen of the State of New York, Plaintiff,
vs.
HOME WATER SUPPLY COMPANY, Citizen of the State of South Carolina, Defendant.

The defendant demurs to the complaint herein for the grounds that it appears upon the face of the complaint; that the complaint does not state facts sufficient to constitute cause of action.

(1) That said complaint fails to state a cause of action in favor of the plaintiff against the defendant.

(2) That no privity of contract is shown between the plaintiff and defendant.

(3) Because the alleged failure of the defendant to lay water mains would not give the plaintiff or Spartan Mills a right of action against the defendant.

(4) Because a tax payer or its assignee would have no right of action against the defendant for failure to obey the City Ordinance, or for violation of, or failure to perform the contract made by the defendant with the City of Spartanburg.

RALPH K. CARSON,
Attorney for the Defendant.

I hereby certify that the foregoing demurrer is meritorious, and not intended merely for delay.

RALPH K. CARSON,
Attorney for the Defendant.

11 *Order Sustaining Demurrer and Dismissing Complaint.*

Filed 14 of July, 1908.

United States of America, District of South Carolina, in the Circuit Court.

GERMAN ALLIANCE INSURANCE COMPANY, Citizen of the State of New York, Plaintiff,
vs.
HOME WATER SUPPLY COMPANY, Citizen of the State of South Carolina, Defendant.

Upon hearing the demurrer in the case above stated and argument thereon, and after consideration thereof, it is

Ordered and adjudged that the demurrer be sustained and the complaint dismissed.

WM. H. BRAWLEY,
U. S. Judge.

July 14, 1908.

Petition for Writ of Error and Allowance of Writ.

Filed Dec. 2, 1908.

UNITED STATES OF AMERICA,
District of South Carolina:

In the Circuit Court, Fourth District.

GERMAN ALLIANCE INSURANCE COMPANY, Citizen of the State of New York, Plaintiff,
against
HOME WATER SUPPLY COMPANY, Citizen of the State of South Carolina, Defendant.

And now comes German Alliance Insurance Company, citizen of the State of New York, plaintiff herein, and says:

That on or about the 14th day of July, 1908, this court granted an order and judgment sustaining the demurrer herein in favor of the defendant against this plaintiff, in which order and judgment certain errors were committed, to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, plaintiff prays that a writ of error may issue in its behalf to the United States Circuit Court of Appeals for the Fourth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly
12 authenticated, may be sent to the Circuit Court of Appeals.

GERMAN ALLIANCE INSURANCE COMPANY,
By WILSON & OSBORNE, *Attorneys.*

Writ allowed.
WM. H. BRAWLEY,
U. S. Judge.
Dec. 19, 1908.

Assignment of Errors.

Filed Dec. 2, 1908.

UNITED STATES OF AMERICA,
District of South Carolina:

In the Circuit Court, Fourth District.

GERMAN ALLIANCE INSURANCE COMPANY, Citizen of the State of New York, Plaintiff,
against
HOME WATER SUPPLY COMPANY, Citizen of the State of South Carolina, Defendant.

To the Honorable the Judge of the Circuit Court for the District of South Carolina:

The plaintiff, by counsel, respectfully assigns the following errors to the order and judgment of this court sustaining the demurrer herein:

1. The complaint shows the cause of action in favor of plaintiff against the defendant as follows:

Plaintiff, an insurer, for valuable consideration, placed forty-six thousand four hundred and sixty-nine dollars of insurance, by standard form of policy, upon certain houses of Spartan Mills, located in the City of Spartanburg, South Carolina. The houses were destroyed by fire March 25, 1907, while under the protection of the policy. The loss was adjusted at thirty-eight thousand eight hundred and ten dollars and paid to said Spartan Mills by the plaintiff, as required by the contract between the parties, and the plaintiff received from the insured a subrogation receipt for the amount, and

an assignment and transfer to plaintiff "of each and all claims and demands against any person, persons, corporations, or property, arising from or connected with such loss or damage," and subrogated plaintiff in its place to its claims and demands against all
13 persons or corporations, to the extent of said amount.

By ordinance of the City of Spartanburg, of date February 14, 1900, a contract was made between the City and the defendant, whereby the defendant company undertook to furnish adequate water protection to the property of the residents of the city, including said Spartan Mills, for a period of thirty-three years from that date, some of the provisions of which ordinance were as follows:

"The said John B. Cleveland and his associates or assigns for the said Home Water Supply Company are authorized and empowered to maintain, operate and own water works in the city of Spartanburg to supply the city and its inhabitants with pure and wholesome water, suitable for fire, sanitary and domestic purposes; to lay down pipes and water mains for the purpose of making extensions along the streets, avenues, and alleys of said city; to acquire and hold any and all real estate, easements and water rights necessary to that end and purpose, to use within the present and future limits of said city all streets, alleys, avenues, bridges, beds of streams and such public grounds as may now or hereafter be laid out; to receive, take, store, purify, conduct, and distribute water through said city, to erect and maintain settling basins, filtering galleries, reservoirs, water tower and all other necessary buildings, and machinery and other appliances, or attachments, necessary or expedient for the purpose of conducting and carrying on of said water works; to cross any street in said city for the purpose of laying pipes, conduits or aqueducts which may be necessary for the proper distribution of water throughout said City, so as to effect the most adequate supply for domestic use and greatest protection against fire. The said grantees to have the right to maintain, establish, conduct and operate said water works, as here specified for the term of thirty-three years from the first day of January, 1900.

"The said grantees shall constantly, day and night, except in the case of an unavoidable accident, keep all the said hydrants supplied with water for fire protection, and shall keep them in good order and efficiency for such service and shall always maintain a height of at least seventy (70) feet of water in the stand-pipe or water tower, except in case of unavoidable accident, or when water shall be drawn off for the clearing the same, or for any cause which cannot be controlled by grantees, and in case any of the hydrants shall be out of order, and the Chief of the Fire Department shall notify any officer in charge of said water works of that fact, and such hydrant shall remain out of order and unfit for use for a longer time than
14 twenty-four hours after such notice, then the said grantees shall pay to the city the sum of seven dollars per week for such hydrant, until it is put in order for use. And the city shall have the right to open the mains hereinbefore located to put in and maintain at its own cost intermediate fire hydrants wherever the in-

tervals on the original location are five hundred feet or less, free of charge for water during the term of this agreement. Said intermediate hydrant to be used for fire purposes only, and for the benefit of the city only.

"And the city may at any time require the said grantees to make extensions of the pipe system of the said water works, by giving sixty days' notice to said grantees, and may order hydrants placed on such extensions at not less than ten to the mile, and the city agrees to pay rental for fire protection upon such extensions at the rate of forty dollars per year, per hydrant, for such unexpired term of the contract or renewals thereof from the time of making such extensions, on the first days of January and July in each and every year during the continuance of this contract, and a sufficient tax shall be collected annually upon all taxable property of said city to meet the payments under this contract and ordinance, when and as they mature, during the existence of this contract or renewals thereof, which tax shall be irrepealable from and after the passage of this ordinance. The thread of all said hydrants shall be made to fit any particular hose coupling now in use by the fire department of the City of Spartanburg, which shall in ten days after the passage of this ordinance or contract be presented by the Mayor of said City to the grantees for such purpose.

"The machinery of said water works shall consist of one compound, condensing duplex steam pump, and one high pressure duplex pump, with return flue tubular steam boilers and other attachments, necessary to give a capacity to pump one million gallons in twenty-four hours against a pressure equivalent to a head of 200 feet, and a metallic stand-pipe or water tower made of the best material and of a capacity of not less than 130,000 gallons, and high enough to afford a head of at least 100 feet above Main street at the Windsor Hotel, or high enough to give adequate domestic pressure in any part of the city, and so arranged that it can be shut off from the pipe system by our patent electrical appliance for opening or shutting the valve or gate, so that in case of necessity and more pressure is required than is afforded by the water tower, the engineer can immediately pump direct into the mains, and give any pressure required by direct pumping. All of the machinery shall be increased from time to time, as the growth of the city may require."

15 That in 1905 and 1906, the City Council ordered the company to put in certain hydrants with connecting pipe, which order, if obeyed, would have carried water protection, to-wit: to within about 200 feet of the first of the buildings which caught fire on said March 25, 1907, instead of something near 650 feet, which was the distance of the nearest hydrant to the fire on said date; but that the defendant, in violation of its duty and obligation, in utter disregard of the property under its contracted and sole protection, and of its obligations to adequately protect the same from fire, and in flagrant defiance of said reasonable and proper order of Council, failed and refused to make such extension, and that as a direct result and consequence, there was no hydrant or plug near enough to fur-

nish water to extinguish said fire; all due to defendant's culpable and wilful negligence and disregard of its duty and obligation to said city and its inhabitants.

Also that defendant further failed and neglected to discharge its duty to said property and its owners, and was culpably and wilfully careless of its duty to them and to the city and its inhabitants, in not having the sufficient pressure which it undertook to furnish, or anything like it; in not having pipe of sufficient size at the nearest approach to said locality, to-wit: at least six-inch pipe, instead of inadequate four-inch, as it had; in not having the electric appliance called for in the contract; in failing absolutely to furnish water with which to extinguish the fire and prevent its spreading to other houses. That, as a direct sequence, the fire department of the city and owners of the property were powerless to check the progress of the fire which occurred and was not extinguished through no fault of the owners, and one house followed another in the disastrous conflagration, wholly because of said company's outrageous disregard of its said duty and obligations, its selfish and inexcusable neglect of its plain duty to said property owners, and its wanton disregard of said property rights, resting under its sole protection; and that thereby, plaintiff has been damaged, as aforesaid, by the negligence, wilfulness and wantonness of said defendant in the sum of $38,810.00, with interest from April 6, 1907, and judgment was asked for said sum.

It is respectfully submitted that the complaint declared the relation between the parties to be that of public duty growing out of contract, and that plaintiff's right of action was for tort for breach of that duty to Spartan Mills by the defendant, because of such relations; and that such relations and such violated duty constituted a cause of action against the defendant company in favor of the insured, to whose rights the plaintiff, as insurer was subrogated, and that his Honor erred in holding in effect that the complaint did not state facts sufficient to constitute a cause of action against the defendant.

16 2. The complaint shows that the plaintiff, as insurer, paid to Spartan Mills, the insured, the amount of its loss; also that the said insured duly assigned and transferred its rights to the plaintiff.

It is respectfully submitted that his Honor erred in holding, in effect, that there was no privity between the plaintiff and the defendant; because of the said assignment and transfer and because of the general rule of law that where the insurer pays to the insured the amount of the loss, insured is subrogated in a corresponding amount to the insured's rights of action against the person or corporation responsible for the loss. The court erred in holding in effect that a subrogation by act of parties, or, because of the general rule of law upon the payment of said loss, gave to the plaintiff herein no right of action against the defendant.

3. That his Honor erred in not holding that the complaint stated a cause of action in favor of the plaintiff against the defendant for said sum of thirty-eight thousand eight hundred and ten dollars,

with interest from April 6, 1907, and in not overruling defendant's demurrer.

4. The court erred in sustaining the demurrer of the defendant to the petition of the plaintiff.

5. The court erred in rendering judgment against this plaintiff upon the sustaining of the demurrer of the defendant.

6. The court rendered judgment against this plaintiff, whereas judgment should have been rendered in favor of the plaintiff and against the defendant.

Wherefore the plaintiff prays that said judgment may be reversed.

GERMAN ALLIANCE INSURANCE COMPANY,
By WILSON AND OSBORNE, *Attorneys.*

Bond on Appeal.

Filed Dec. 21, 1908.

American Surety Company of New York.

Capital and Surplus, $5,000,000.00.

Know all men by these presents, that we, German Alliance Insurance Company, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto Home Water
17 Supply Company in the full and just sum of two hundred and fifty dollars to be paid to the said Home Water Supply Company, its certain attorney, executors, administrations, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12 day of December, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a term of the Circuit Court of the United States for the District of South Carolina, in a suit pending in said court, between German Alliance Insurance Company, citizen of the State of New York, plaintiff, and Home Water Supply Company, citizen of the State of South Carolina, defendant, a judgment was rendered against the said German Alliance Insurance Company, in favor of said defendant, and the said German Alliance Insurance Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Home Water Supply Company citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond, on the day in the said citation mentioned;

Now, the condition of the above obligation is such, that if the said German Alliance Insurance Company shall prosecute said writ of error to effect, and answer all damages and costs if it fails to make

its plea good, then the above obligation to be void; else to remain in full force and virtue.

AMERICAN SURETY COMPANY OF NEW YORK,
By RICH'D DEMING, *Resident Vice-President.*

[SEAL.]

Attest:
H. H. SIMPKINS,
Resident Assistant Secretary.

GERMAN ALLIANCE INSURANCE COMPANY,
WM. N. KREMER, *President.*

[SEAL.]

Attest:
C. G. SMITH, *Secretary.*

Sealed and delivered in presence of:

—— ——.

18 STATE OF NEW YORK,
County of New York, ss:

On the 14 day of December, in the year 1908, before me personally came William N. Kremer, to me known, who, being by me duly sworn, did depose and say: that he resided in New York City, that he is the president of German Alliance Insurance Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation; and that he signed his name thereto by like order.

[SEAL.] LOUIS A. TRUSLOW,
Notary Public for Kings County.

Certificate filed in New York County.

STATE OF NEW YORK,
County of New York, ss:

On this 12 day of December, 1908, before me personally appeared Richard Deming, Resident Vice-President of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and says: that he resides in Ossining, New York; that he is the Resident Vice-President of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knows the corporate seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said corporation; that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said Richard Deming

further said that he is acquainted with H. H. Simpson, and knows him to be one of the Resident Assistant Secretaries of said corporation; that the signature of said H. H. Simpson subscribed to the said instrument, is in the genuine handwriting of the said H. H. Simpson, and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him the said Richard Deming, Resident Vice-President.

[SEAL.] JARED F. HARRISON, JR.,
Notary Public, New York County.

Approved:
WM. H. BRAWLEY,
U. S. Judge.

19 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the District of South Carolina Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between the German Alliance Insurance Company, citizen of the State of New York, plaintiff, and Home Water Supply Company, citizen of the State of South Carolina, defendant, a manifest error hath happened, to the great damage of the said German Alliance Insurance Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Fourth Circuit, together with this writ, so that you have the same at Richmond, on the 13th day of January next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of our Supreme Court, the 19th day of December, in the year of our Lord one thousand nine hundred and eight.

[SEAL OF COURT.] C. J. MURPHY,
Clerk of the Circuit Court of the United States,
District of South Carolina.

Allowed by:
WM. H. BRAWLEY,
U. S. Judge.

20 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Home Water Supply Company, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit to be holden at Richmond on the 13th January next pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of South Carolina, wherein the German Alliance Insurance Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Wm. H. Brawley, United States Judge for the District of South Carolina.

This 19th day of Dec., in the year of our Lord, one thousand nine hundred & eight.

WM. H. BRAWLEY,
United States Judge.

Service of this citation by delivery of copy thereof to me at Spartanburg, S. C., admitted this 21st day of Dec., 1908, without prejudice.

RALPH K. CARSON,
Att'y for Defendant.

Filed Dec. 19, 1908.

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

Order to Transmit Record.

And thereupon, it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States Circuit Court of Appeals for the Fourth Circuit, and the same is transmitted accordingly.

C. J. MURPHY,
[SEAL.] *C. C. C. U. S., Dist. S. C.*

21 & 22 *Clerk's Certificate.*

The United States of America, District of South Carolina, in the Circuit Court, Fourth Circuit.

At Law.

I, C. J. Murphy, Clerk of the Circuit Court of the United States for the District of South Carolina, do hereby certify that the fore-

going is a true and correct copy of all the records and proceeding
in the case of German Alliance Insurance Company, plaintiff, again
Home Water Supply Company, defendant, rendered as aforesai
together with the judgment and all things relating to the same, a
appears by the record now on file in my office.

Given under my hand and seal of said court, at Charleston, S. C
in the district aforesaid, this 9th day of January, A. D., 1909.

[SEAL OF COURT.]

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

23 *Proceedings in the United States Circuit Court of Appeals fo the Fourth Circuit.*

No. 882.

GERMAN ALLIANCE INSURANCE COMPANY, Plaintiff in Error,
vs.
HOME WATER SUPPLY COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the District South Carolina, at Greenville.

January 11, 1909, transcript of record is filed, and cause dockete
Same day, appearance of Stanyarne Wilson, Hartwell Cabell, an
Wilson & Osborne, for the plaintiff in error, is entered, order filed.

January 22, 1909, appearance of Ralph K. Carson, for the defen
ant in error, is entered, order filed.

Same day, to-wit: January 22, 1909, twenty copies of the print
record are filed.

24 *Stipulation to Continue Case.*

Filed February 6, 1909.

UNITED STATES OF AMERICA,
District of South Carolina:

In the Circuit Court of Appeals.

#882.

GERMAN ALLIANCE INSURANCE CO., Plaintiff,
vs.
HOME WATER SUPPLY COMPANY, Defendant.

It is stipulated and agreed by counsel hereto that this cause
continued until the May Term of this Court, it being impractica
to prepare it for presentation at the present term.

Feb'y 5, 1909.

WILSON & OSBORNE,
Attorneys for Plaintiff in Error.
RALPH K. CARSON,
Attorney for Defendant in Error.

March 12, 1909 (February Term, 1909), cause is continued until the May Term, 1909.

June 3, 1909 (May Term, 1909), cause came on to be heard before Pritchard, Circuit Judge, and Waddill and McDowell, District Judges, and is argued by counsel, and submitted.

November 4, 1909 (November Term, 1909), the Court announced and filed its opinion, which is as follows, to-wit:

25 *Opinion.*

Filed November 4, 1909.

United States Circuit Court of Appeals, Fourth Circuit.

No. 882.

GERMAN ALLIANCE INSURANCE COMPANY, Plaintiff in Error,
versus
HOME WATER SUPPLY COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the District of South Carolina, at Greenville.

[Argued June 3, 1909; Decided November 4, 1909.]

Before Pritchard, Circuit Judge, and Waddill and McDowell, District Judges.

Hartwell Cabell (Wilson and Osborne on the brief) for plaintiff in error; Ralph K. Carson (Kirkland and Smith on the brief) for defendant in error.

McDOWELL, *District Judge:*

This is an action at law, brought by an insurance company against a water company, the complaint being drawn in accordance with the Code of South Carolina. The facts may be very briefly stated. Under a contract between the city of Spartanburg, South Carolina, and a water company (defendant in error) the latter was, as is alleged, required to lay six inch water mains, to place hydrants at certain intervals and to maintain a certain pressure. It is alleged that the water company failed to comply with its contract in the
26 respects above mentioned, and that in consequence a fire, which could have been readily extinguished in its incipiency if the contract had been complied with, destroyed a number of houses belonging to the Spartan Mills, a corporation, doing business in Spartanburg, with all of its property in the city and a city tax payer, entitled to protection from fire. The houses had been insured by the plaintiff below (plaintiff in error), and after payment of the losses to the mill company by the insurance company, the former executed a "subrogation receipt" to the insurance company, whereby the rights of the mill company were assigned to the in-

surance company. A demurrer to the complaint was sustained a
the action dismissed.

As no question is made as to the right of the insurance compa
to maintain an action where a property owner could maintain
we shall consider only the alleged liability to the property own
It should also be stated that we have here no contract between t
water company and the property owner, and neither ordinance n
provision in the contract between the city and the water compa
to the effect that the water company shall be liable to the proper
owners.

In considering the question of the alleged liability of the wat
company to the property owner, it will tend to clearness of thoug
to first consider the action at bar as being ex contractu, founded
pressly on breach of contract. The property owner is not a party
the contract, and it is conceded that the city does not owe him t
duty of furnishing water. The benefit to him is clearly not a dir
benefit. A mere supply of water, adequate in amount and und
full pressure, would not of itself avail him anything. It seems
us that the overwhelming array of authority denying liability mu
be held sound in result on the accepted principles of the law of co
tract. The argument that the city acts as the agent of the proper
owners in making such contracts does not seem to us to be soun
The city is in some sense the agent of the citizens in the aggrega
It is not the agent of the citizens separately and individually. Th
theory if carried to its logical conclusion would result in intolerab
conditions, and is subversive of thoroughly established principl
No further weight seems to us to be given the argument in behalf
the property owner by the fact that the consideration for the wat
company's agreement comes in large measure from the proper
owners. The connection is too remote. The water company
case of default in payment by the city must sue the city and for
it to collect from the citizens. The water company cannot sue t
individual citizen.

27 For rulings in favor of the right of recovery see Paduc
Lumber Co. v. Paducah Water Co., 89 Ky., 340; 25 Am. S
Rep., 536 (which has been followed by some subsequent cases
Kentucky); Gorrell v. Water Co., 124 N. C., 328, 70 Am. St. Rep
598 (which was followed in Fisher v. Supply Co., 128 N. C., 37
38 S. E., 914); Planters Oil Mill v. Monroe Water Works, 52 L
Ann., 1243; Mugge v. Tampa Co. (Fla.), 42 So., 81, 6 L. R.
(n. s.), 1171. We are also referred to Crone v. Stinde, 156 Mo
262, which we have not been able to see, but which is said to int
mate that Howsman v. Trenton Co., 119 Mo., 304, 41 Am. St. Rep
654, and Phœnix Insc. Co. v. Trenton Company, 42 Mo. App., 11
are unsound.

A sufficient number of the decisions against the right of recover
are found in Lovejoy v. Bessemer Co., 146 Ala., 374, 41 So., 76
6 L. R. A. (n. s.), 429; 1 Farnam on Waters, sec. 160*b*; 30 Am.
Eng. Ency. (2d ed.), 429 et seq. See also Anerum v. Camden Co
82 S. C.

Can a right of action be maintained on the theory that this is a
action in tort?

Having reached the conclusion that the property owner has no right of action ex contractu, it would seem to follow that no liability in tort can exist, because the assumed duty arises only from a contract by which the plaintiff is not given any right of action. However, the opinion in Guardian Trust Co. v. Fisher, 200 U. S., 57, seems to us to call for the discussion which follows, especially in view of the following:

"* * * if the company proceeds under its contract, constructs and operates its plant, it enters upon a public calling. It occupies the streets of the city, acquires rights and privileges peculiar to itself. It invites the citizens, and if they avail themselves of its conveniences and omit making other and personal arrangements for a supply of water, then the company owes a duty to them in the discharge of its public calling, and a neglect by it in the discharge of the obligations imposed by its charter, or by contract with the city, may be regarded as a breach of absolute duty, and recovery may be had for such neglect. The action, however, is not one for breach of contract, but for negligence in the discharge of such duty to the public, and is an action for tort."

The first inquiry of course is, whether or not the Supreme Court, in the case above mentioned, has rendered a binding decision on the right of the property owner to recover from a water company
28 under the circumstances alleged in the case at bar. We are of opinion that the court did not in that case decide this question. In that case the Supreme Court did decide that the judgment in the state court was a judgment in tort and also that the effect of sec. 1255 N. C. Code, 1883, was to make a judgment in tort against the successor in interest of a corporation mortgagor as effective as such a judgment against the mortgagor. In the opinion it is said:

"The statute subordinates the mortgage to judgments for torts. Now what is the judgment? It is a determination that upon the facts stated the plaintiff is entitled to recover so much money. It may not be essential that it recite whether the facts stated show a breach of contract or a tort, but it is essential that the judgment should be considered as a determination that upon those facts the plaintiff is entitled to recover. And it must be assumed that under the statute the mortgagee and the bondholders it represents agree to accept the judgment as conclusive in this respect, or if not conclusive, at least prima facie evidence."

We have therefore a case in which the mortgagee had in effect contracted that its property, so to speak, should be bound by any judgment obtained without fraud against the mortgagor (or its successor), if the judgment were in tort. It follows that the character of the judgment obtained by Fisher in the state court was the only question presented to and decided by the Supreme Court. In other words, the question before the court was this: It being conceded in effect that Fisher had a right of action against the Supply Company, can this right of action be properly classed as sounding in tort? It is also to be remembered that the judgment in Fisher v. Supply Company came from North Carolina, one of the few states holding that there is privity of contract between the water company and the prop-

erty owner. (Gorrell v. Water Co., 124 N. C., 328, 70 Am. St. Rep., 598.) Such being the fact, there being a conclusively adjudicated privity of contract and a liability ex contractu, the ruling that there is a liability in tort for neglect in the performance of the contract is simply affirmatory of all of the large class of cases illustrated by the liability in tort of a common carrier to its passengers.

The question before us is therefore not settled by Guardian Trust Co. v. Fisher, supra; but in view of what is there said some discussion of the question is necessary.

It can only tend to clearness of thought to lay out of consideration at the outset that large class of cases in tort in which there is
29 a direct contractual relation between the plaintiff and the defendant; such as the liability in tort of a common carrier to its passenger, including the "invitation to alight" cases; of the blacksmith to his customer, where the blacksmith by incompetence or negligence lames the horse; of the attorney to his client; and of the physician to his patient, where the contract of employment is made by the patient. In all such cases there is a relation between the plaintiff and defendant such as does not exist here—a clear privity of contract.

It will also tend to clearness to lay aside those cases in which liability in tort arises from a violation of statute or lawful ordinance by the defendant. For instance, cases in which the plaintiff is injured at a public crossing by the failure of a railway company's servants to sound warnings or to check the speed of the train, in violation of statutes or ordinances. In such cases there is no contract relation at all, but the duty owing by the defendant to the plaintiff is more readily referable to the statute or the ordinance than to the common law duty.

Cases in which there is no statute or ordinance governing the duty of a railway company at public crossings will be considered later on. And it may not be amiss to here call attention to the fact that in such cases the complaint is of a misfeasance, while in the case at bar the complaint is for what is to be classed as a non-feasance.

Can it be said that the defendant here has entered upon the performance of a public duty? If so, there is a liability in tort to the property owner specially injured by neglect in the performance of such duty.

We are cited to Robinson v. Chamberlain, 34 N. Y., 389, and Fulton Insc. Co. v. Baldwin, 37 N. Y., 648. In the first of these cases the defendant had contracted with the state keep in repair the locks on certain sections of the Erie Canal, and it was held that, "a public officer, or a contractor engaged to perform the duties of a public officer, is liable for negligence or malfeasance to any one sustaining special damage in consequence thereof." In the Baldwin case the defendant had contracted to keep a section of the canal free from obstructions and was held liable to an insurance company which had paid losses to the owner of a canal boat sunk by reason of a snag negligently left in the canal by the contractor. In Robinson v. Chamberlain, supra, it is said:

"The only question in this case is, whether an action will lie

against a contractor, employed by the State, pursuant to law, to keep a portion of the canals in proper condition and repair, who
30 neglects his duty, whereby the plaintiff sustains special damage.

"It is a familiar doctrine, that, 'when a corporation or individual is bound to repair a public highway or navigable river, they are liable to indictment for the neglect of their duty' (Per Nelson, J., in the People v. The Corporation of Albany, 11 Wend., 539).

"A navigable river is a public highway; our canals, open and free to all for navigation, upon payment of the toll fixed by law, as our turnpikes are, for travel upon like terms, are, I think, in every sense, public highways.

"A failure to keep a public highway in repair by those who have assumed that duty from the State, so that it is unsafe to travel over, is a public nuisance, making the party bound to repair liable to indictment for the nuisance, and to an action at the suit of any one who has sustained special damage."

In the cases above mentioned there are features which distinguish them from the case at bar. In them the contract serves no necessary purpose other than to identify the person who should perform the duty. The duty is created by law; existed before the contract was made; an indictment lies for failure to perform it; and the public is the direct, and the state the indirect, beneficiary. In the case at bar the duty, if it exists, did not exist until the contract was made; the contract alone furnishes the measure of the duty; no indictment lies for failure to comply with the contract, and the city is the direct beneficiary, while the property owner is only indirectly and incidentally benefited. We have said that the contract alone creates the duty, if it exists. This is true because it is universally conceded that the city owes no duty to its property owners to establish water works, and if the city does establish such works, it is not liable to its property owners for neglect in operation. U. S. v. Sault Ste. Marie, 137 Fed., 258; 2 Dill. Municip. Corps., sec. 975; 28 Cyc., 1303; Boston Co. v. Salem, 94 Fed., 238; Metropolitan Co. v. Topeka Co., 132 Fed., 702, 704. We have said that the contract alone furnishes the measure of duty, if it exists. In a case such as we have here it would be clearly erroneous to say that the duty is to lay reasonably large mains, to install hydrants at reasonable intervals and to maintain a reasonable, or a reasonably adequate, pressure. Such requirements may exceed the requirements of the contract. Consequently if a duty to the property owner exists, it is a duty to use care to perform the contract. No indictment lies for failure to perform the
31 contract, because such breach of contract is neither a crime nor a misdemeanor. The remaining distinction is obvious without elaboration. In a contract to perform a true public duty the citizen is benefited directly. In the case at bar the property owners are indirectly benefited, and only then in the event that the city properly utilizes the water supplied by the water company.

It would seem therefore that we could not consider the defendant here as having entered upon the performance of a public duty, even if the contract itself did not negative such hypothesis.

In so far as the expression "public calling" conveys any meaning other than that implied in the term "public duty," it may here be said that it seems to us that the defendant here has not undertaken a public calling. The contract restricts its calling, in respect to supplying water for combating fire, to that of supplying the city. The defendant distinctly has not entered upon the calling of supplying water, for fire purposes, to the public. In the sense that a public calling is one that brings the one following the calling into contact with the public, in the sense that the calling is such that the public has an interest (even an indirect interest) in the manner in which it is carried on, the defendant has entered upon a public calling. But the question remains whether this particular public calling is such that a liability in tort to the public arises for acts of nonfeasance.

Let us now consider some cases of liability in tort where there is no contract, or in which the contract can be disregarded. Such cases may be illustrated as follows: Where a surgeon is employed by the father of the patient (Gladwell v. Stiggall, 5 Bing. N. C., 733, 35 E. C. L., 393), or by the husband (Pippin v. Sheppard, 11 Price, 400) of the patient, and is liable in tort at the suit of the patient for malpractice or neglect; or where the physician is employed by the county authorities to attend charity patients at the almshouse (DuBois v. Decker, 130 N. Y., 325, 29 N. E., 313,) and is liable in tort to a charity patient for incompetence or neglect; where a manufacturing pharmacist negligently labels a poison as a harmless drug and is held liable in tort to one who is thereby injured and to whom it was administered by a remote vendee (Thomas v. Winchester, 6 N. Y., 397, 57 Am. Dec., 455), and the case of a railway company injuring a person at a crossing by neglect, in the absence of statute or ordinance (23 Am. & Eng. Ency. (2d ed.), 756), or where it is held liable notwithstanding compliance with an ordinance (Grand Trunk R. Co. v. Ives, 144 U. S., 408).

32 The most noticeable feature of these cases, which is common to all of them, is the danger to the public from neglect by the defendant. In each of these cases we may with some propriety say that the defendant had entered upon a "dangerous calling." See also Oil Co. v. Deselmos, 212 U. S., 159, 178—an excellent illustration of a dangerous calling.

In considering whether or not the water company has entered upon a calling to be properly classed as "dangerous," we are confronted by some differences between the cases instanced above and the case at bar.

There is in marked degree a helplessness on the part of the physician's patient, of the one who takes a mislabelled drug, and of the traveller on a level crossing, which is far from being so noticeable in the case of the property owner. He still has fire insurance, chemical extinguishers, and the same crude methods of combating fires in their incipiency that he had before the city water plant came into existence.

If the danger of neglect in water company cases were so imminent as in the cases above mentioned, in view of the length of time that

water companies have been in existence, we should have a "cloud" of decisions asserting liability in tort to property owners on the ground of "dangerous calling," whereas the absence of authority for taking such position is most marked.

If neglect by a water company in respect to supplying water for combatting fire is so dangerous to the public that the company must be held to have entered upon a "dangerous calling," it would seem that the courts would long since have swept away the defense on the part of the city (furnishing water for fire purposes) that it is performing a governmental function. "Salus populi suprema lex." The very fact that such defense is so universally held good, seems to us a strong argument for holding that the danger to the public from neglect in supplying water for fire purposes is not so imminent or so extreme as to justify the courts in classifying the calling as "dangerous." The citizens had no right of action when the city was doing itself what it has since engaged the water company to do, and they are in no worse plight now. No very good reason suggests itself for holding that danger to the public becomes suddenly the dominant feature of the calling, because a private person or corporation has undertaken it.

There remains a further distinction between the case at bar and the "dangerous calling" cases. In the latter the duty is independent of contract. In the case at bar, if the duty exists, it is created by and originates in a contract made with some one other than the
33 plaintiff, and is so entirely measured by the contract that the supposed duty is simply to perform the contract.

In Longmeid v. Holliday, 6 E. L. & E., 562, 6 Exchq., 761, Baron Parke said: "There are other cases, no doubt, besides that of fraud, in which a third person, although not a party to the contract, may sue for damage sustained by him if it be broken. These cases occur where there is a wrong done to a person for which he could have a right of action, although no such contract had been made; * * *."

The very fact that the duty, if it exists, originates in, and is only to be measured by, the contract, forbids the conclusion that the duty arises in behalf of any one not in sufficient privity with the contractor to maintain an action ex contractu. In other words, the want of privity which denies to the plaintiff a right of action ex contractu, forbids a finding that a duty to the plaintiff is created by the contract.

A difference between the case at bar and the admitted liability in tort of a water company which, for instance, leaves a trench open in a street without lights, is found in the respect last above mentioned: In leaving a trench open, the duty to the person injured thereby does not originate in and is not measured by the contract between the city and the water company. The duty exists independently of and without reference to the contract. And this difference exists without reference to the further fact that in the case supposed the act complained of is in a sense affirmative, a misfeasance; while in the case at bar the act is negative, a non-feasance.

Let us now mention a few decided cases, generally accepted as

sound, which seem to us to afford precedents for denying the existence of a right of action in tort in the plaintiff here.

In Savings Bank v. Ward, 100 U. S., 195, an attorney at law, employed and paid solely by his client and without knowledge as to the purpose for which it was obtained, gave to his client an opinion on the title of real estate which the attorney supposed belonged to his client, to the effect that the title was good and the property unencumbered. The client had previously conveyed the property to another and this conveyance although on record was overlooked by reason of the negligence of the attorney. The client used the opinion and thereby obtained a loan from the bank, mortgaging the real estate as security therefor. By reason of the unreported conveyance the bank lost the loan and thereupon sued the attorney. The court, although not unanimously, held that the attorney was not liable to the bank.

In Winterbottom v. Wright, 10 Mees. & W., 109, it was held that the driver employed by the owners of a coach line could not
34 maintain an action in tort againts the builder of the coach, whose negligence in the construction of the coach caused an injury to the plaintiff.

In Longmeid & wife v. Holliday, 6 Eng. Law & Equity Repts., 562, 6 Exchq., 761, A. sold a lamp manufactured by A. to B. and by reason of negligence in the construction of the lamp B.'s wife was injured. It was held that an action in tort by the wife against A. did not lie.

It cannot be denied that an attorney who prepares an opinion on title must know that it may be used to the injury of some one or more of the public; the coach builder must know that negligence in the construction of a coach especially if it is to be used in public service may result in death or injury to some of the public; the manufacturer of lamps must know that a lamp sold by him is likely to be used by others than his immediate purchaser, and that negligence in construction is to such extent dangerous to the public. And yet in these cases liability in tort was denied. A duty to the plaintiff was in each case held not to have existed, and in each case the plaintiff was injured as the result of a breach by the defendant of a contract with a third party.

We do not think it necessary to discuss at length the liability of a water company in case it were under no contract to supply water for fire purposes, but nevertheless undertakes to do so. (200 U. S., 69.) We have no such case here, but still it seems not improper to say that in our opinion there would be no liability in tort to the property owner unless there were also a liability ex contractu upon an implied agreement between the company and the property owner. If the consideration was paid by the city, and not directly by certain property owners, it would assuredly prevent the implication of an agreement between the water company and the individual property owners. And inability to maintain an action ex contractu on the part of the property owner would defeat his right to maintain an action ex delicto. If the water company were to collect from certain property owners direct, it is inconceivable that there should not be first an

agreement at least as to the amount to be charged, and an implied promise to render some ascertainable service to the property owners paying therefor. No such case is likely to arise; but if it should it would be so unlike the case at bar as to afford us no aid in reaching a proper conclusion.

Among the water company cases in which the question of liability in tort to the property owner was considered and denied may be mentioned: Nickerson v. Bridgeport Co., 46 Conn., 24, 33 Am.
35 & 36 Rep., 1, 5; Foster v. Lookout Co., 2 Lea, 42 (see note 33 Am. Rep., 8); Fowler v. Athens Co., 83 Ga., 219, 20 Am. St. Rep., 313, 315, 9 S. E., 673; Nichol v. Huntington Co., 53 West Va., 384, 44 S. E., 290; Britton v. Green Bay Co., 81 Wisc., 48, 29 Am. St. Rep., 856, 51 N. W., 84; House v. Houston Co., 88 Tex., 233, 28 L. R. A., 532; 31 S. W., 179; Anerum v. Camden Co., 82 S. C., —; Fitch v. Seymour Co., 139 Ind., 214, 47 Am. St. Rep., 258; 37 N. E., 982.

In Anerum v. Camden Co., supra, a suggestion is made which is well worthy of consideration:

"For the attainment of these municipal ends the city has the right to pay out public funds. It may well be doubted whether it has the right to apply public funds to the larger compensation which a water company of necessity must charge for the enormous peril of having to pay for all private property lost by its negligence. Such expenditure of municipal funds raised by taxation of all property would be an unjust discrimination in favor of those whose property is exposed to fire loss, and against those whose property is not subject to that peril. There is at least a strong presumption against a municipality undertaking to pay for such indemnity from the public revenue."

Our conclusion is that the judgment below must be

Affirmed.

37 November 10, 1909 (Same Term), the Court made and entered the following judgment, to-wit:

Judgment.

Filed and Entered November 10, 1909.

United States Circuit Court of Appeals, Fourth Circuit.

No. 882.

GERMAN ALLIANCE INSURANCE COMPANY, Plaintiff in Error,
vs.
HOME WATER SUPPLY COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the District of South Carolina.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby affirmed, with costs.

J. C. PRITCHARD.

Nov. 10, 1909.

38 And on another day, to-wit: December 1, 1909, the mandate of this court is issued and transmitted to the said Circuit Court at Greenville, S. C., in due form.

Clerk's Certificate.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In testimony whereof I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 12th day of February, A. D., 1910.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

39 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which German Alliance Insurance Company is plaintiff in error, and Home Water Supply Company is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the District of South Carolina, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the

40 Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 12th day of April, in the year of our Lord one thousand nine hundred and ten.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

41 [Endorsed:] File No. 22069. Supreme Court of the United States, No. 843, October Term, 1909. German Alliance Insurance Company vs. Home Water Supply Company. Writ of Certiorari. The execution of the within writ appears from the schedules hereunto annexed. Henry T. Meloney, Cl'k, U. S. Cir Court — Appeals, 4" Circuit.

42 United States Circuit Court of Appeals, Fourth Circuit.

No. 882.

GERMAN ALLIANCE INSURANCE COMPANY, Plaintiff in Error,
vs.
HOME WATER SUPPLY COMPANY, Defendant in Error.

Stipulation.

It is hereby stipulated and agreed that the Transcript of the Record in the above entitled cause heretofore filed in the Supreme Court of the United States with the application for Writ of Certiorari, may be taken as a return to the writ and that no new Transcript be made.

HARTWELL CABELL,
Counsel for Plaintiff in Error.
RALPH K. CARSON,
Counsel for Defendant in Error.

Entered into this 14th day of April, 1910.

UNITED STATES OF AMERICA, *ss:*

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing stipulation of counsel is a true copy of the original filed April 15, 1910, and now remaining among the records and proceedings in the therein entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals, at Richmond, this 16th day of April, A. D., 1910.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

43 United States Circuit Court of Appeals, Fourth Circuit.

UNITED STATES OF AMERICA:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do make return to the annexed writ of certiorari issued out of the Supreme Court of the United States in the cause therein entitled on the 12th day of April, 1910, by annexing hereto a certified copy of the stipulation of the attorneys of rec-

ord that the transcript of the record in the above entitled cause heretofore filed in the Supreme Court of the United States with the application for a writ of certiorari, may be taken as a return to the writ and that no new transcript be made.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals, at Richmond, on this 16th day of April, A. D., 1910.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

44 [Endorsed:] File No. 22,069. Supreme Court U. S. October Term, 1909. Term No. 843. German Alliance Insurance Co., Petitioner, vs. Home Water Supply Co. Writ of Certiorari and Return. Filed April 18, 1910.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1909.

GERMAN ALLIANCE INSURANCE COMPANY,
Petitioner,

vs.

HOME WATER SUPPLY COMPANY,
Respondent.

19
[redacted] 282

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of the German Alliance Insurance Company respectfully shows to this Honorable Court as follows:

The German Alliance Insurance Company, a corporation and citizen of New York, as subrogee to the rights of Spartan Mills, a corporation, seeks in this action to recover damages against Home Water Supply Co., a corporation and citizen of South Carolina, for negligence and misfeasance in the furnishing of water for general fire purposes, under a contract with the City of Spartanberg, South Carolina.

The action was brought in the Circuit Court for the District of South Carolina, the jurisdiction of

which court was based on diverse citizenship. The complaint (transcript 2) alleged:

The ownership by Spartan Mills of the property destroyed, and its location to be in the City of Spartanberg; the issue to the owner for valuable consideration by German Alliance Insurance Company of a policy of insurance against loss or damage by fire with respect to said property.

That during the life of the policy a fire occurred which destroyed the greater portion of the property insured, the loss being adjusted between the insurance company and Spartan Mills at the sum of $38,810, which sum, less one per cent. discount for a payment in advance of maturity, was paid to Spartan Mills by German Alliance Company. The fire is alleged to have occurred in March, and the loss to have been adjusted and paid in April, 1907.

That in February, 1900, the City Council of Spartanberg had entered into a contract with the Home Water Supply Company, whereby the latter undertook to furnish adequate water protection to the property of the residents of Spartanberg for a period of thirty-three years from said date; that, among other things, it was in said contract provided that the water company should establish all mains necessary for the distribution of water throughout the city, being given the privilege of crossing the streets of the city for the purpose of laying such pipes, conduits or aqueducts as might be necessary for the proper distribution of water throughout the city so as to effect the most adequate supply for domestic use and greatest protection against fire; that when mains were put in for city fire protection, they were not to be less than six inches in diameter, unless permission were granted by the City Council.

That it was further provided in said contract that the Water Company should constantly, night and day, except in the case of unavoidable accident, keep all the hydrants supplied with water for fire protection; that it should keep them in good order

and efficiency for such service, and should always maintain a height of at least seventy feet of water in the standpipe or water-tower, except in case of unavoidable accident, or when water should be drawn off for the clearing of the same, or for any cause which could not be controlled by said Water Company.

That the contract further provided that the City might, at any time, require the Water Company to make extensions of its system of mains by giving sixty days' notice to said company, and might order hydrants placed on such extensions at the rate of not less than ten to the mile; and that the Water Company should install a patent electrical apparatus for opening or shutting the valve or gate between the standpipe or water-tower and its system of mains, so that, in case of necessity, and should more pressure be required than that afforded by the water-tower, the engineer could pump directly into the mains, thereby giving any pressure required.

That in the years 1905 and 1906 the City Council of Spartanberg had, in accordance with the provisions of said contract, directed and ordered the Water Company to put in certain hydrants with connecting pipe, which order, if obeyed, would have carried fire protection to within about two hundred feet of the first of the buildings belonging to Spartan Mills that caught fire in March, 1907; that this order had been disregarded, and on the day of the fire the nearest hydrant to the said building which first caught fire was about six hundred and fifty feet away.

The complaint further alleged that the water company had disregarded its contract in that it had failed to install the patent electrical appliance for shutting off the water-tower and obtaining increased pressure by pumping directly into the mains; that it had further disregarded its contract by using four-inch pipe instead of six-inch pipe in the mains for supplying fire hydrants contiguous to the property destroyed, and that furthermore, on

the day of said fire, the pressure of water in the tower was far less than the contract called for. The complaint alleges, in conclusion, that as a direct consequence of the negligence and malfeasance in the performance of its contract in these several regards by the water company, the Fire Department of the City of Spartanberg and the owners of the property were powerless to check the progress of the fire which had commenced through no fault of the owner; and that one house after another was destroyed in the conflagration which ensued from lack of water with which to extinguish the flames.

The resultant damage from the neglect and malfeasance of the water company, is placed at the amount of loss by fire to the Spartan Mills which the German Alliance Insurance Company was compelled to pay under its policy, and judgment is asked in that amount against the Water Company.

The Home Water Supply Company demurred to the complaint upon the following grounds (Transcript 10):

(*a*) That the complaint does not state facts sufficient to constitute a cause of action.

(*b*) That the complaint fails to state a cause of action in favor of the plaintiff against the defendant.

(*c*) That no privity of contract is shown between plaintiff and defendant.

(*d*) Because the alleged failure of the defendant to lay water mains would not give the plaintiff or Spartan Mills a right of action against the defendant.

(*e*) Because a taxpayer or its assignee would have no right of action against the defendant for failure to obey the said ordinance, or for violation of, or failure to perform the contract made by the defendant with the City of Spartanberg.

The Circuit Court sustained this demurrer and ordered the complaint dismissed (Transcript 11). No opinion was handed down. The case was taken to the U. S. Circuit Court of Appeals for the 4th Circuit upon error (Transcript 11).

The specifications of error (Transcript 14) set forth at some length the several grounds upon which the German Alliance Insurance Company claimed that the action of the Circuit Court in sustaining the demurrer and dismissing its complaint, was erroneous; but they may be summarized under the single proposition that the complaint as a matter of law stated a cause of action and, therefore, should not have been dismissed.

The Circuit Court of Appeals sustained the judgment of the Court below in dismissing the complaint, holding in substance that no action will lie either on contract or in tort against private water companies for damages sustained by inhabitants of municipalities (Opinion, Transcript 25 *et seq.*)

Your petitioner insists that this action on the part of the Circuit Court of Appeals was erroneous and in direct conflict with the law as determined heretofore by the judgment and decision of this Court. In *Guardian Trust & Deposit Company* v. *Fisher*, reported in 200 U. S., 57, this Court decided the questions of law raised by the demurrer in this case in favor of the contention of this petitioner.

Your petitioner has no right of appeal or writ of error herein to this Honorable Court, because the jurisdiction of the Circuit Court depended entirely on diverse citizenship.

Your petitioner presents herewith as a part of this petition a brief showing more fully its views upon the question involved and a transcript of the record in the Circuit Court of Appeals. WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the 4th Circuit, commanding such court to certify and send to this Court, on a day certain

to be therein designated, a full and complete transcript of the record and all the proceedings of the said Circuit Court of Appeals in the said case therein entitled "German Alliance Insurance Company, Plaintiff in Error *vs.* Home Water Supply Company, Defendant in Error, No. 882," to the end that the said case may be reviewed and determined by this Court as provided in Section 6 of the Act of Congress entitled "AN ACT TO ESTABLISH CIRCUIT COURTS OF APPEALS AND TO DEFINE AND REGULATE IN CERTAIN CASES THE JURISDICTION OF THE COURTS OF THE UNITED STATES, AND FOR OTHER PURPOSES," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said act, and that the said judgment of the Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray.

THE GERMAN ALLIANCE INSURANCE CO.,
By HARTWELL CABELL,
Counsel.

UNITED STATES OF AMERICA,
Southern District of New York,
County and State of New York. } ss.:

WILLIAM N. KREMER, being first duly sworn, states that he is the president of the above named petitioner, the German Alliance Insurance Company, and as such president has full knowedge of its business affairs and particular knowledge of the matters and things set forth in the above petition, and of the conduct and proceedings in the above entitled action; that he has read the foregoing petition subscribed by him and knows the contents thereof, and that the facts therein stated are true.

Subscribed and sworn to before me this 11th day of March, 1910. } William N. Kremer

Chas. Reed

[SEAL.] Notary Public,
New York Co.

I hereby certify that I have examined the foregoing petition, and that in my opinion the petition is well founded as to the matters of facts and as to the matters of law, and that the case identified thereby is one and is such that the prayer of the petition should be granted by this Honorable Court.

Harold Caleb

No. [redacted]

Supreme Court of the United States.

OCTOBER TERM, 1909.

GERMAN ALLIANCE INSURANCE COMPANY,
Petitioner,

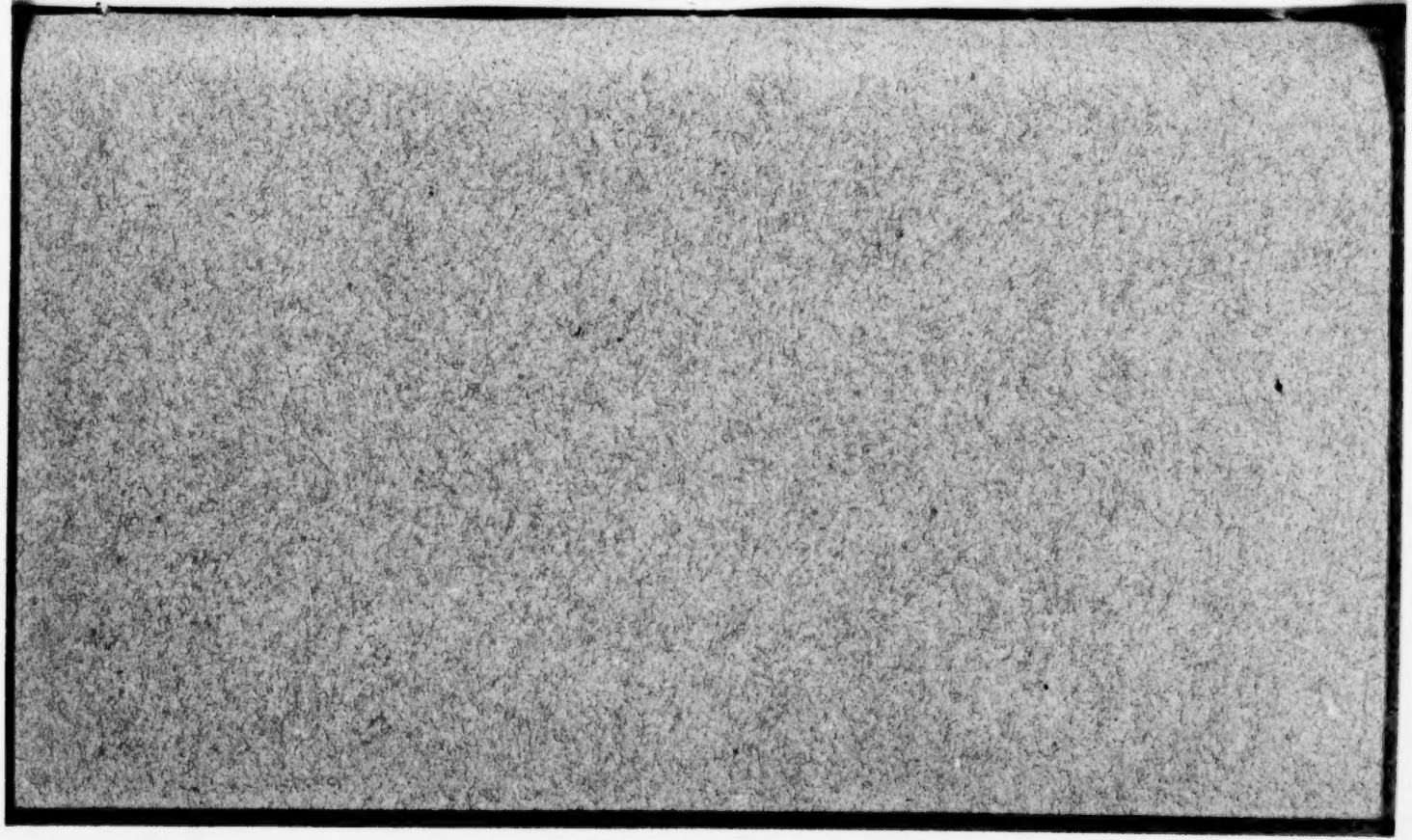
vs.

HOME WATER SUPPLY COMPANY,
Respondent.

BRIEF FOR PETITIONER.

HARTWELL CABELL,
Counsel for Petitioner, GERMAN ALLIANCE INSURANCE COMPANY.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.



Supreme Court of the United States.

OCTOBER TERM, 1909.

GERMAN ALLIANCE INSURANCE COMPANY,
Petitioner,

vs.

HOME WATER SUPPLY COMPANY,
Respondent.

BRIEF FOR PETITIONER.

Statement.

The German Alliance Insurance Company (petitioner herein) commenced an action against the Home Water Supply Company (respondent herein) in the United States Circuit Court in and for the District of South Carolina on May 7th, 1907.

The action was to recover damages for the de struction of certain property by fire, belonging to plaintiff's subrogor and located in Spartanburg, South Carolina, caused by the negligence and misfeasance of defendant.

The allegations of the complaint in this action appear in full in the printed transcript (p. 2) and are substantially set forth in the petition herein.

To this complaint, defendant interposed a d
murrer which raised the issue whether the alleg
tions of the complaint constituted a cause of actio
This demurrer was sustained by the Circ
Court, no opinion being rendered, and judgme
was entered dismissing the complaint.
The case was taken on error to the Circuit Cou
of Appeals for the Fourth Circuit, which cou
affirmed the judgment of the court below, in
opinion delivered by McDowell, *J.*, copy of whi
appears in the printed transcript (p. 25 *et seq.*).

Argument.

The sole question involved in the case at bar,
whether an action in tort will lie against a priva
water company for negligence or wilful misfeasan
in failing to supply a municipality and its inha
tants with sufficient water for fire purposes, whe
it has contracted with the municipality for such su
ply and has entered into the performance of t
contract.
During the last half century, repeated attemp
have been made by individuals who have lost the
property through fires which could have been e
tinguished with an adequate water supply, to ho
this class of quasi public corporations responsible f
their shortcomings. Actions have been broug
both on contract and in tort; and the questions
volved have been exhaustively discussed by t
bench, at the bar, and by text writers. In so
jurisdictions, citizens have been allowed to recov
sometimes on the theory of breach of contra
sometimes as for a tort; in others, courts have
fused to permit a recovery upon either form of a
tion. The cases are irreconcilable, and the diff
ences in the opinions expressed by the many judg
who have dealt with the subject, are as numero
almost as the judges expressing them. Recover
on contract have been denied for want of privi
and permitted because of privity. Recoveries

tort have been denied because the injury was declared to be *damnum absque injuria;* because it was held that *tort* would not lie where contract would not lie, and for numerous other and equally learned and ingenious reasons. On the other hand, recoveries in tort have been allowed and the application of the doctrine of *damnum absque injuria* denied; and courts have insisted that an action in tort could be sustained where no cause of action upon a contract existed.

It is not the intention of counsel to burden this Court with a review of these numerous authorities, or with a critical and extended discussion of the correctness or incorrectness of the conclusion reached by the Court below in holding that in this effort to recover for the admitted negligence of the defendant, no action will lie either in tort or on contract. This petition is presented here in the belief that this Court, by its decision in *Guardian Trust Co.* vs. *Fisher* (200 U. S., 57), has declared itself to be in accord with those authorities who hold that an action in tort will lie against a water company, through whose negligence or wilful misfeasance private property has been destroyed by fire; that that decision is binding upon the lower Federal courts; and that the refusal of the Circuit Court of Appeals of the Fourth Circuit to follow it in deciding this case, calls for the exercise of the power vested in this court to bring before it for review, decisions of the lower courts which would otherwise be final.

The argument will therefore be confined to a consideration of *Guardian Trust Co.* vs. *Fisher*, and an ascertainment of what questions were before this Court for decision in that case, and how they were decided.

A brief review of the various steps in the litigation which culminated in the decision of this Court in *Guardian Trust Co.* vs. *Fisher*, will be necessary. A private water company under contract with a municipality, having constructed its plant, executed

a mortgage upon its property to secure an issue of bonds. A subsequent mortgage was made which was afterwards foreclosed and the property sold to a new corporation, subject, however, to the lien of the first mortgage. Thereafter, the new corporation executed a further mortgage, covering the same property. Subsequently, and while the plant was being operated by the second company, a fire occurred which destroyed certain property located within the municipality.

Fisher, the owner of this property, sued the second water company in the courts of North Carolina for damages, alleging negligence on the part of the company in its failure to supply sufficient water to extinguish the fire. By special verdict the jury found the several issues of negligence, &c., in favor of the plaintiff.

Pending this action, the trustees under the existing corporation mortgages brought foreclosure proceedings in the United States Circuit Court; the property of the water company was sold under decree of that court, and the resulting fund paid into court for distribution.

Sec. 1255 of the North Carolina Code (1883) gives a judgment creditor where the judgment is given for a tort a priority over bondholders secured by a mortgage upon corporate property; and in order to avail himself of this statutory preference, Fisher insisted that the judgment entry in the State court should show on its face that the judgment was *for a tort*. The trial Court refused to make such entry, and the case was taken to the Supreme Court of the State, where the lower court was reversed and the cause remanded, and under instructions, the judgment was framed to recite that the recovery was "*for the tortious injury and damage done by the negligence of the defendant*" (*Fisher* vs. *Greensboro Water Supply Co., 128 N. C., 375*).

To the action in the State court, neither the trustees under the mortgages covering the property of the defendant company, nor the bondholders, were

parties, and the Supreme Court of North Carolina refused to pass upon the question of plaintiff's right to a preference under Sec. 1255 *on the ground that the question was not before them.*

Fisher then intervened in the proceedings in the Federal court, set up his judgment and claimed a preference under the section of the North Carolina Code referred to. The Circuit Court allowed the priority of his lien over the claims of the bondholders under both mortgages, and its decree was sustained by this Court, to which the case was finally brought by writ of *certiorari* (*Guardian Trust Co.* vs. *Fisher*, *200 U. S., 57*).

It was upon the theory that the only question before the Supreme Court was whether the judgment of the North Carolina court was *in tort*, and that this Court did not have before it the question whether, upon the facts found by the jury, a tort was shown to have been committed, that the Circuit Court of Appeals declared that the judgment in *Trust Co.* v. *Fisher* was not decisive upon the question involved in the case at bar. It therefore considered itself at liberty to disregard the language of Mr. Justice Brewer, in which, after reciting the conclusion of the State court, the learned Justice continues:

> "From the conclusion thus reached we are not inclined to dissent, and for these reasons. One may acquire by contract an opportunity for acts and conduct in which parties other than those with whom he contracts are interested, and for negligence in which he is liable in damages to such parties. * * * Pollock, in his treatise, groups torts into three classes, in the last of which he specifies 'breach of absolute duties specially attached to the occupation of fixed property, to the ownership and custody of dangerous things, and to the exercise of certain public callings' (Webb's Pollock on Torts, 7). This, it is said, implies the existence of some absolute duty

not arising from personal contract with the other party to the action.

And here we are met with the contention that, independently of contract, there is no duty on the part of the water company to furnish an adequate supply of water; that the city owes no such duty to the citizen, and that contracting with a company to supply water imposes upon the company no higher duty than the city itself owed, and confers upon the citizen no greater right against the company than it had against the city; that the matter is solely one of contract between the city and the company, for any breach of which the only right of action is one *ex contractu* on the part of the city. It is true that a company contracting with a city to construct water works and supply water may fail to commence performance. Its contractual obligations are then with the city only, which may recover damages, but merely for breach of contract. There would be no tort, no negligence, in the total failure on the part of the company. It may also be true that no citizen is a party to such a contract, and has no contractual or other right to recover for the failure of the company to act, but if the company proceeds under its contract, constructs and operates its plant, it enters upon a public calling. It occupies the streets of the city, acquires rights and privileges peculiar to itself. It invites the citizens, and if they avail themselves of its conveniences, and omit making other and personal arrangements for a supply of water, then the company owes a duty to them in the discharge of the obligations imposed by its charter, or by contract with the city, which may be regarded as a breach of absolute duty, and recovery may be had for such neglect. The action, however, is not one for breach of contract, but for negligence in the discharge of such duty to the public, and is an action for tort. 'The fact that a wrongful act is a breach of contract between the wrongdoer and one person does not exempt him from the responsibility for it as a tort to a third person injured thereby.' *Osborne* v. *Morgan* (130 Massachusetts, 102, 104). See also *Emmons* v. *Alvord* (177 Massachusetts, 466, 470). An

individual may be under no obligation to do a particular thing, and his failure to act creates no liability, but if he voluntarily attempts to act and do the particular thing, he comes under an implied obligation in respect to the manner in which he does it. A surgeon, for instance, may be under no obligation in the absence of contract, to assume the treatment of an injured person, but if he does undertake such treatment he assumes likewise the duty of reasonable care in such treatment. The owner of a lot is not bound to build a house or store thereon, but if he does so he comes under an implied obligation to use reasonable care in the work to prevent injury therefrom to others (*Holmes on the Common Law, 278*). Even if the water company was under no contract obligations to construct water works in the city or to supply the citizens with water, yet having undertaken to do so, it comes under an implied obligation to use reasonable care, and if through its negligence injury results to an individual it becomes liable to him for the damage resulting therefrom, and the action to recover is for a tort and not for breach of contract."

We respectfully submit that the question, whether an action for tort would lie upon the facts shown, was before the Supreme Court for decision in *Trust Co.* vs. *Fisher*, and was necessarily decided in the affirmative by them in granting priority to Fisher's lien. For a conclusion on their part that the facts found by the jury did not in fact constitute a tort, as that word is understood in the language of the law, would have necessitated a reversal of the lower Court, and a denial of the priority of Fisher's lien over those of the bondholders.

In the first place, it is to be borne in mind that the rights of bondholders were being determined in the Federal courts. These bondholders were neither parties nor privies to the proceedings in the state courts, and therefore were not bound by the conclusion reached by that court, that the facts found

by the jury constituted a tort. That question, so far as they were concerned, was left open for determination by the federal court whose jurisdiction they had invoked.

Brooks vs. *Ry. Co.*, *101 U. S.*, *443*.
Hassall vs. *Willcox*, *130 U. S.*, *493*.

In *Brooks* vs. *Ry. Co.*, *101 U. S.*, *443*, a sub-contractor, having filed his lien upon railroad property sued thereon, making the railway company and the principal contractor, parties, and, having obtained a judgment, intervened in a foreclosure suit brought by the mortgagees. The mortgagees objected to the validity of the lien and to its being given priority, and it was urged that they were bound by the judgment of the State court. This Court says, on page 445:

> "To these proceedings (suits in the State court to enforce lien) Barnes, the principal contractor, and the railroad company were parties, and we take it for granted that as against them the judgments established the validity of the liens. The judgments do not bind the appellants (mortgagees) as they were not parties thereto. The validity of the liens as against them, and, if valid, their precedence to that of the mortgage, are the questions for consideration here, and they must be determined by applying the statutes of Iowa to the facts of this case."

In *Hassall* vs. *Willcox*, *130 U. S.*, *493*, a Texas statute giving priority to the labor liens on railroads, was to be construed and enforced. A creditor holding such liens obtained judgment in the State court, and afterwards intervened in a proceeding to foreclose, instituted in the federal courts by bondholders. The question of the validity and priority of the labor liens was referred to a master. The master held against the liens in part as containing charges for which no priority was given by statute. Upon exceptions the Circuit Court re-

versed this finding and gave judgment for the entire liens. The Supreme Court, in reversing the Circuit Court and sustaining the findings of the Master, held:

> "(1) That the bondholders were not bound by the judgment rendered in a suit to which they were not made parties.
>
> (2) As the claims of the creditor originated after the mortgage was made he was bound to prove affirmatively before the master the existence and priority of his liens.
>
> * * * (6) It was proper that the claim should be re examined before a master."

Under these authorities, it is clear that, as to the bondholders, the decision in the Supreme Court of the State in *Fisher* vs. *Greensboro Water Supply Co.* (128 N. C., 375) formed no estoppel, and that the question whether the facts relied upon by Fisher as a cause of action were such as satisfied the definition of the legal term "*tort*" as used in the statute so as to entitle him to a preference was open for decision by the federal courts.

The conclusion reached, both by the United States Circuit Court and by the Supreme Court, that the facts found by the jury in *Fisher* vs. *Greensboro Water Supply Co.* (*supra*) were sufficient to sustain a judgment *for a tort*, was not therefore mere *obiter dictum*, but the decision of a question which had to be decided by the federal courts in favor of Fisher in order to give him a preference over the mortgage liens.

It remains to consider whether the federal courts were bound, by any rule of decision, to adopt the conclusion reached by the Supreme Court of North Carolina, that a judgment based on the facts shown in *Fisher* vs. *Greensboro Water Supply Co.* was a judgment "for a tortious injury and damage done * * * by the negligence of the defendant."

The full text of Sec. 1255 of the North Carolina Code (1883) is as follows:

> "Mortgages of incorporated companies upon their property or earnings, whether in bond or otherwise, hereafter issued, shall not have power to exempt the property or earnings of such corporations or execution for the satisfaction of any judgment obtained in the courts of this State for labor performed (nor for materials furnished such corporation) *nor for torts* committed by such incorporation, its agents or employees, whereby any person is killed or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding."

It is to be noted that the statute contains no enumeration of the specific wrongs, judgment for which shall be entitled to priority. The Legislature makes use of the technical term "*torts*" in describing the causes of action which, when reduced to judgment, shall be given preference.

It cannot be urged, in considering the effect of the judgment of this Court in *Guardian Trust Co.* vs. *Fisher*, that the courts of North Carolina have by numerous adjudications settled the construction of this statute so as to raise something in the nature of "rule of property," which the federal courts would feel inclined to follow. The previous cases in North Carolina allowing recoveries against private water companies under similar circumstances (*Gorrell* vs. *Greensboro Water Supply Co.*, 124 N. C., 328; *Jones* vs. *Durham Water Co.*, 135 N. C.) had proceeded upon the theory of the right of the party aggrieved to recover in a suit *upon the contract* with the municipality, on the theory that the contract had been entered into for the benefit of the inhabitants, and that therefore they were entitled to maintain an action thereon.

Furthermore, in *Fisher* vs. *Greensboro Water Supply Co.*, the Supreme Court of North Carolina does not undertake to construe or apply Section

1255. As to Fisher's rights under that law, they refused to commit themselves, the bondholders not being before them, and the question not being raised by the record. They content themselves with declaring that the facts shown, constituted a tortious injury, as that term is to be understood at common law.

But even had they undertaken to construe the statute, it is submitted that the federal courts would not be bound by such construction in a case involving parties whose rights have not been cut off by estoppel of record.

Section 34 of the Judiciary Act of 1889 has been repeatedly held by this Court to be limited in its scope to state laws strictly local, dealing with rights and titles to things having a permanent locality, such as real estate titles and other matters immovable and intra-territorial in their nature and character. The federal courts, in construing State statutes, have uniformly declared their independence of State decisions, where the questions involved were matters of a general nature, or, the terms to be defined those of general use in jurisprudence.

Swift vs. *Tyson*, *16 Peters*, *1*.
B. & O. RR. vs. *Baugh*, *149 U. S.*, *368*.
Venice vs. *Murdock*, *92 U. S.*, *501*.
Pleasant Township vs. *Ætna*, *138 U. S.*, *67*.

As was said in *Burgess* vs. *Seligman* (109 U. S., 20, 34):

> "The very object of giving to the national courts jurisdiction to administer the *laws of the States* in controversies between citizens of different States, was to institute independent tribunals which might be supposed would be unaffected by local prejudices and sectional views."

Granting that the bondholders whose rights were involved in *Guardian Trust Co*, vs. *Fisher*, must

be held to have purchased their bonds with knowledge of Section 1255 (N. C. Code), and of the priority over their claims given thereby to judgments for torts, they were, under the authorities above cited, entitled to have a federal court, whose jurisdiction is properly invoked, define the term as used in the statute, and were not concluded by the definition of the word "tort," which might be adopted by a State court in an action in which they were neither parties nor privies.

If, for example, the State court, in the action brought by Fisher against the water company, had entered a judgment *for a tort* upon facts showing clearly inevitable accident or an act of God or some other proximate cause, injuries resulting from which have been universally classed as *damnum absque injuria*, it would be absurd to say that this Court, in determining for the first time the rights of non-resident bondholders who have appealed to the federal jurisdiction, was to be held bound by such adjudication.

The Circuit Court, in its consideration of *Guardian Trust Co.* vs. *Fisher* (115 Fed., 189), clearly recognized its right, so far as the bondholders were concerned, to determine for itself whether a cause of action in tort formed the basis of Fisher's claim and adopted the language of this Court from *Wisconsin* vs. *Pelican Ins. Co.*, 127 U. S., 265, as its own:

> "This judgment (*Fisher* vs. *Supply Co.*, *128 N. C.*, *375*), is entitled to full faith and credit. As between the corporation and the plaintiff it would be conclusive. It is presented in a case in which mortgagees are parties; and the question is, not whether the judgment be valid, but whether it is a judgment of such character as it will be given priority to the claim of the mortgagees who were not parties to the suit in which it was obtained. When such a judgment is presented to the Court for affirmative action, while it cannot go behind the judgment for the purpose of examining into the validity of the claim, it is not precluded from ascertaining whether the claim is

> really one of such a nature that the Court is authorized to enforce it."

In recognition of the same rule of decision, this Court, in considering the case, and being called upon to decide whether the judgment in the State court was for a tort, and therefore entitled to priority, apparently reached the very natural conclusion that the proper way to determine the question was to see whether the facts on which the judgment was based constituted a tort. If they did not, there was no judgment *for a tort* which this Court would enforce against the bondholders, even though the North Carolina courts had decided as between other parties that those facts did constitute a tort. If they did, Fisher was entitled to his priority under the statute. The Court answered the question affirmatively, thereby committing the Federal courts to the doctrine that a private water company, when it enters upon the performance of its contract with a municipality, incurs certain duties to the public, the breach of which, when attended by injury to private property, constitutes a tort, and that such injury is not *damnum absque injuria*.

In *Mugge* vs *Tampa Water Works Co.*, *42 So. Rep.*, *84*, the Supreme Court of Florida, in considering the effect of the decision of this Court in *Trust Co.* vs. *Fisher*, say (p. 85):

> "It is contended by the defendant in error that the only question before the United States court in these cases, was whether the judgments rendered in the North Carolina courts were in tort or on contract, and that the question of the right of the plaintiff to sue at all was not passed upon. But it seems to us that both these courts passed on the question of the right of the plaintiff to sue in tort, and that they upheld that right, for if the plaintiff did not have the right to sue in tort, then it follows that their judgments could not have been given priority over the mortgages. * * * Certainly there is noth-

ing in the opinion of these courts that suggests a doubt of the correctness of the reasoning of the Supreme Court of North Carolina, but on the contrary that reasoning is supported and strengthened."

In *Ancrum* vs. *Camden Water, Light & Ice Co.*, *64 S. E. Rep., 151*, the Supreme Court of South Carolina reached the conclusion that an action in tort would not lie under circumstances similar to the case at bar. In their opinion, however, they say:

> "A number of courts of last resort, *including the Supreme Court of the United States*, hold, contrary to our conclusion, that in a case of this kind the water company is liable" (citing *Trust Co.* vs. *Fisher*, *200 U. S., 57*).

In *Knuth* vs. *Butler Elect. Ry., 148 Fed., 73*, the United States Circuit Court, sitting in the District of Montana, cited *Trust Co.* vs. *Fisher* as authority for the proposition that a duty may arise out of a contract, but independently of such contract, and that for a breach of it an action will lie in tort and no contract is required to support it.

Judge McDowell, in the case at bar, directly opposes the views held by these courts as to the effect to be given to the decision in *Trust Co.* vs. *Fisher*. His language, found on page 27 of the Transcript, is as follows:

> "The first inquiry of course is whether or not the Supreme Court in the case above mentioned has rendered a binding decision on the right of the property owner to recover from a water company under the circumstances alleged in the case at bar. *We are of opinion that the court did not in that case decide this question.*"

In his consideration of the Fisher case, the learned Judge proceeds on the theory that the Federal courts, in dealing with the rights of the bondholders, were bound by the decision of the State court, which held

that Fisher had a cause of action against the water company, the only question remaining open for determination by the United States tribunals being whether the judgment was *in tort*

It would seem that if the bondholders are to be concluded by the decision of the State court, that a cause of action existed, they should also be concluded by the judgment of that Court that this cause of action was based upon "*the tortious injury and damage done him by the negligence of the defendant*" and that the judgment should so recite. Both these questions were before the Court and both were decided by it, and if the estoppel of record included one point it would naturally extend to both. It is only upon the theory that the decision in *Fisher* vs. *Greensboro Water Supply Co.* did not preclude the bondholders from questioning both the existence of a cause of action and the nature of that cause, that there was anything at all for the Federal courts to decide.

If our contention as to the scope of the decision of this Court in *Guardian Trust Co.* vs. *Fisher* be correct, the judgment of the Circuit Court of Appeals affirming the judgment of the Circuit Court, dismissing the complaint filed in that court by this petitioner, should not be permitted to stand.

If we are mistaken, then, in view of the fact that two courts of last resort and a lower Federal tribunal have apparently fallen into the same error, some further expression from this Court, either modifying or explaining its judgment in *Guardian Trust Co.* vs. *Fisher* would, in furtherance of justice and to prevent uncertainty and confusion, seem to be required.

Respectfully submitted,

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